was no *de jure* claimant.[13] *Peterson* v. *Benson*, 112 Pac. 801 (Utah). Some have gone further and have allowed him to set off such expenses as he had incurred against the claim of the *de jure* officer.[14] Beyond this, few courts have ventured.

These cases give relief upon essentially equitable grounds. If the doctrine of unjust enrichment is thus invoked, ought it not to be consistently applied? Ought not the recovery in the first class of cases and the extent of the set-off in the second to be limited to the amount that the state has been enriched or the *de jure* officer benefited? Then the true conception of an "office" will be left intact. The salary would still be a part of the office and both would belong to the *de jure* officer.[15] For he only is an "officer" to whom the sovereign power has delegated sovereign functions.

CONSTITUTIONALITY OF COMMON PROVISIONS IN PRIMARY ELECTION ACTS. — Primary election laws owe their creation to the corruption, abuse, and complex methods of the political caucus or convention of the past century.[1] They aim to simplify the difficulties of nomination for public office and enable the individual voter to exert the influence he deserves.[2] Legislative interference with political parties is justified on the basis of securing a free expression of the will of individual citizens by such reasonable regulation,[3] or on the ground that the plenary power of the legislature thus comes into play, since political parties are not mentioned in the Constitution,[4] or that the legislature having granted the privilege of the Australian ballot may condition its use.[5] These laws frequently stipulate that a party wishing to use the primary system must have polled a certain percentage of the general vote,[6] or in its primary must have polled a certain percentage of its own vote for a particular office at the last election.[7] Thus a recent Wisconsin case, *State ex rel. McGrael* v. *Phelps*, 128 N. W. 1041, holds a statute requiring that the aggregate number of votes cast for all candidates at the primary must equal twenty per cent of the party vote for governor at the preceding election constitutional, while a North Dakota case, *State ex rel. Dorval* v. *Hamilton*, 129 N. W. 916, reaches an opposite result where

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[13] Behan *v.* Davis, 3 Ariz. 399. The *de facto* officer may, however, sue for his salary in several states even when there is a *de jure* officer. Brinkerhoff *v.* Jersey City, 64 N. J. L. 225; Gorman *v.* Boise County Commissioners, 1 Idaho 655; Henderson *v.* Glynn, 2 Colo. App. 303; Reynolds *v.* McWilliams, 49 Ala. 552.

[14] Bier *v.* Gorrell, 30 W. Va. 95; Henderson *v.* Koenig, 192 Mo. 690; Mayfield *v.* Moore, 53 Ill. 428. See 23 HARV. L. REV. 571.

[15] Nichols *v.* MacLean, 101 N. Y. 526. The *de jure* officer can recover the salary even if he has been working elsewhere. Bullis *v.* The City of Chicago, 235 Ill. 472. But see Farrell *v.* City of Bridgeport, 45 Conn. 191.

[1] See 2 BRYCE, THE AMERICAN COMMONWEALTH, 3 ed., 98, 101–102.

[2] See MEYER, NOMINATING SYSTEMS, part II, ch. I. For an excellent article on recent primary legislation, see 5 ILL. L. REV. 203.

[3] Ladd *v.* Holmes, 40 Or. 167.

[4] See Kenneweg *v.* County Comm. of Allegany County, 102 Md. 119.

[5] Commonwealth *v.* Rogers, 181 Mass. 184.

[6] MINN. REVISED LAWS, 1905, ch. VI, § 182.

[7] WIS. LAWS OF 1909, ch. 477. See CAL. LAWS OF 1909, ch. 405.

the percentage was thirty per cent of the last party vote for secretary of state.

Election laws confining the advantages of the Australian ballot and methods of nomination by convention to parties polling a certain percentage of the vote have been generally upheld,[8] the object of such restrictions being to keep the officially printed ballot within convenient bounds, and to prevent confusion in voting. The similar provision of the primary laws, however, is designed to check the members of one party from taking part in the nominations of another, to prevent the accidental nomination of a non-representative candidate, to determine what shall constitute the act of a party, and to stimulate the elective franchise at the primaries. Such provisions have been attacked on various grounds as contravening the state constitutions,[9] but have been upheld by several courts.[10] It is contended that this interference is an unjust and unreasonable discrimination against the smaller parties, that the legislature has no power of regulation over political organizations, and that voters are thus deprived of the right of selection of candidates which is an incident to the right of suffrage.[11] True, several parties might conspire by combination to deprive another of its access to the primaries by agreeing to vote for its candidate for the office fixed as a criterion, but it is submitted that the prevention of this is within the domain of the legislature rather than the judiciary. In the absence of constitutional provision such as allowing citizens to convene,[12] it is difficult to detect why a legislative body has not the power to declare that organizations having a certain number of votes shall enjoy certain privileges just as much as that an individual receiving the greatest number of votes shall occupy a public office. Nor is it for the court to pass upon the reasonableness or stability of acts of the legislature. Since parties unable to fulfil the requisites of the primary laws are not usually deprived of their existence thereby, but still have the alternative of nomination by petition,[13] it would seem that the North Dakota court might better have considered the statute of that state in the light of its discriminating provision, that unless the required percentage be obtained "*no nomination* shall be made in that party for such office." [14] For if this clause is literally construed it might well be held to impair the right of suffrage as provided for by the state constitution.

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[8] De Walt *v.* Bartley, 146 Pa. St. 529; People *ex rel.* Dickerson *v.* Williamson, 185 Ill. 106. See 21 HARV. L. REV. 622.

[9] The North Dakota Constitution offers a typical example of the grounds of attack: § 11, "All laws of a general nature shall have a uniform operation;" § 20, "No citizen or class of citizens shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens."

[10] State *ex rel.* Fitz *v.* Jensen, 86 Minn. 19; State *ex rel.* Adair *v.* Drexel, 74 Neb. 776; Katz *v.* Fitzgerald, 152 Cal. 433; Ladd *v.* Holmes, *supra.*

[11] See MERRIAM, PRIMARY ELECTIONS, ch. VI.

[12] See Britton *v.* Board of Election Comm., 129 Cal. 337.

[13] State *ex rel.* Fitz *v.* Jensen, *supra*; State *ex rel.* Adair *v.* Drexel, *supra*; Ladd *v.* Holmes, *supra.*

[14] "If the total vote cast for any party candidate or candidates for any office for which nominations are herein provided for shall equal less than thirty per cent of the total number of votes cast for Secretary of State of the political party he or they represented at the last general election, *no nomination* shall be made in that party for such office. . . ." NORTH DAKOTA LAWS OF 1907, ch. 109, § 12.